2007

Horton V. Bourne Partnership Ltd., a Utah limited Partnership v. STC Holdings, a Utah general partnership, Steve Glezos, an individual, and Glenn Pettit, an individual : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

HORTON V. BOURNE PARTNERSHIP, LTD., a Utah limited Partnership, Plaintiff and Appellee, -vs- **STC HOLDINGS,** a Utah general partnership; **STEVE GLEZOS**, an individual; and **GLEN PETTIT**, an individual, Defendants and Appellants.	Docket No. 20070326-CA

OPENING BRIEF OF APPELLANTS

APPEAL FROM THE ORDERS OF THE THIRD JUDICIAL DISTRICT COURT, HONORABLE THOMAS L. KAY, DATED SEPTEMBER 8, 2006 AND APRIL 3, 2007

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JURISDICTION

This matter was transferred to the Court of Appeals by the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(4). This Court has Jurisdiction to decide appellants' appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. **Issue:** Did the district court err in granting judgment against Pettit and Glezos personally where the court found it an undisputed fact that these individuals were acting on behalf of their respective of limited liability companies?

Standard of Review: "Because summary judgment is granted as a matter of law rather than fact, the appellate court is free to reappraise the trial court's legal conclusions. The appellate court reviews those conclusions for correctness, without according deference to the trial court." *Brown v. Weis*, 871 P.2d 552, 559 (Utah App. 1994). A trial court's decision not to pierce the corporate veil will be upheld if there is substantial evidence in favor of the judgment." *D'Elia v. Rice Dev., Inc.*, 2006 UT App 416, ¶ 21.

Citation to Record Showing Issue was Preserved: Defendants filed a timely motion to set aside the judgment, for relief from the judgment and for a new trial. R. 584-586.

2. **Issue:** Considering that it was an undisputed fact that Pettit and Glezos were acting on behalf of their respective limited liability companies, did the trial court abused its discretion by not requiring those entities to be joined as indispensable parties?

Standard of Review: A trial court's determination of whether a party should be joined to an action will not be disturbed absent an abuse of discretion. *Green v. Louder*, 2001 UT 62 , ¶ 40.

Citation to Record Showing Issue was Preserved: Defendants filed a timely motion to set aside the judgment, for relief from the judgment and for a new trial. R. 584-586.

APPLICABLE STATUTES AND RULES

UTAH R. CIV. P. 7(c).

> (c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.
>
> (c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

UTAH R. CIV. P. 19. Joinder of persons needed for just adjudication.

> (a) Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a

party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (I) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by court whenever joinder not feasible. If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

UTAH R. CIV. P. 56(C).

Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

UTAH CODE ANN. § 48-2c-601: General Rule.

> Except as provided in Section 48-2c-602, no organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company.

STATEMENT OF THE CASE

A. Nature of the Case.

Plaintiff-appellee filed suit in connection with a Real Estate Purchase Agreement (the "Agreement") between plaintiff-appellee and Defendant STC Holdings ("STC"). Plaintiff-appellee sought declaratory relief with respect to the meaning of certain provisions of the Agreement. Plaintiff-appellee also asserted claims for breach of contract, wrongful lien, quiet title, slander of title and interference with economic relations. Plaintiff-appellee alleged that STC was a general partnership consisting of Glezos and Pettit and therefore these individuals were personally liable.

Eventually, plaintiff-appellee and the district court determined that it was an undisputed fact that Pettit and Glezos were not partners in STC but rather STC was a dba of Land Solutions, LC and Glezos was its only member. It was also an undisputed fact that Pettit was acting on behalf of 90th South Joint Venture, LLC. Nonetheless the district court imposed personal liability on Pettit and Glezos.

B. Course of Proceedings.

Defendants answered the complaint, alleging as affirmative defenses, *inter alia*,

that Plaintiff had failed to join indispensable parties, namely Land Solutions, LC. Land Solutions, LC, sought to intervene in the case. Defendants brought a motion asserting that Defendant Pettit was not personally involved in the transaction and should be dismissed. Discovery was conducted and, thereafter, plaintiff-appellee moved for summary judgment against all Defendants which was granted. The order granting summary judgment made a factual determination that Pettit and Glezos were acting on behalf of their respective limited liability companies; however, the order imposed personal liability on both Glezos and Pettit.

Thereafter, Defendants objected to the entry of judgment against Glezos and Pettit personally and filed a motion styled "Motion to Set Aside Judgment, for Relief from Judgment and for New Trial." Plaintiff filed its Memorandum of Costs and Affidavit in Support of Award of Attorneys' Fees. Defendants' objected to the reasonableness of the fees and filed a second post-judgment motion styled "Defendants' Supplemental Motion for Partial Summary Judgment – Dismissal of Glen Pettit."

These post-judgment motions were pending when Defendants terminated their legal counsel. New counsel was retained and Defendants' Rule 60(b) motion was filed.

C. Disposition By Trial Court.

Having granted summary judgment and entered a judgment against defendants, a hearing was held on (1) defendants' motion to set aside judgment, motion for relief from judgment, motion for new trial and other relief; (2) defendants' objections to the award of

attorneys' fees; (3) the pending supplemental motion for partial summary judgment, seeking dismissal of Pettit; and (4) the Rule 60(b) motion filed by Defendants newly retained counsel.

At the hearing, Defendants withdrew their objection to the reasonableness of the attorneys' fees requested by Plaintiff-appellee's counsel and fees were awarded, as requested. The trial court denied the Defendants' three pending motions and this appeal followed.

STATEMENT OF FACTS

1. This action arises out of the Agreement for the purchase of certain real property located in Davis County, Utah. The parties to the Agreement were the plaintiff-appellee as seller and "STC Holdings or assigns" ("STC") as purchaser. R. 366-375.

2. The Agreement provided for a specific purchase price for the real property, which was to be adjusted for unuseable acreage. The dispute which lead to litigation arose from the parties' different interpretations of the Agreement's provisions and requirements concerning what constitutes "unuseable" acreage and the process by which that acreage is to be determined. *Passim.*

3. Purchaser, STC Holdings is a dba of Land Solutions, LC, which assigned its interest the Agreement to 90th South Joint Venture, L.C. R. 575, 578.

4. 90th South Joint Venture, LLC, executed a settlement statement in an effort to close on the property. R. 578.

5. Hence, Land Solutions, LC and 90th South Joint Venture, LLC together with plaintiff-appellee were the only parties involved in the Agreement. R. 575, 578.

The Complaint

6. In late 2005, a complaint was filed in which the Plaintiff-appellee named STC, Steve Glezos and Glen Pettit as defendants. Glezos and Pettit were named in their personal capacities as plaintiff-appellee incorrectly assumed STC was a general partnership made up of these two individuals. R. 1-17.

7. Obviously, plaintiff-appellee's complaint never alleged any that Glezos and/or Pettit were alter egos of any corporate entity as the complaint never contemplated the participation of limited liability companies. *Id.* Later the plaintiff-appellee would eventually acknowledge that Glezos and Pettit acted on behalf of their respective limited liability companies. R. 179-180.

The Answers and Affirmative Defense of Defendants

8. STC and Glezos filed an Answer in which they raised the affirmative defense of failure to join Land Solutions, LC, as an indispensable party. R. 25.

9. Pettit filed an Answer and also raised the affirmative defense of failure to join Land Solutions, LC, as an indispensable party. R. 101.

Land Solutions, LC's Motion to Intervene

10. Shortly after STC and Glezos answered the complaint, Land Solutions, LC filed a motion to intervene. R. 35-37. Plaintiff-appellee never filed a response to the

motion to intervene. R. 39-40.

11. About a month after the motion to intervene was filed a notice to submit the motion for a decision was with the district court. *Id.*

12. Shortly after the notice was filed, former counsel for defendants filed a letter addressed to plaintiff-appellee's counsel. R. 41. This letter memorializes a conversation defendants' counsel had with the district court clerk whereby the court via the clerk granted Land Solutions' motion to intervene. *Id.*

13. Plaintiff-appellee's counsel received the letter and proposed order. R. 685. However, plaintiff-appellee did not agree that STC should be dismissed from the litigation. *Id.*

14. No order granting Land Solution, LC's motion to intervene was ever entered.

Motion to Dismiss Pettit

15. In early 2006, Defendants filed a motion to dismiss Pettit from the litigation, supported by the affidavit of Glezos. R. 105-109, 97-99, respectively.

16. In response to the motion to dismiss, Plaintiff asserted that STC was a partnership made up of Pettit and Glezos. R. 165-166.

17. Plaintiff-appellee also noted in its memorandum in opposition to the motion to dismiss Pettit that:

a. Pettit signed the settlement statement which accompanied the tender

of the reduced purchase price on behalf of 90th South Joint Venture, the assignee of STC Holdings (R. 166);

b. Pettit signed a check for $10,000.00 which was submitted with the settlement statement (*Id.);*

c. Pettit, along with Glezos, ordered the survey commissioned in connection with the purchase of the subject property (R. 167); and,

d. that Pettit, along with Glezos, had conversations with an appraiser and a surveyor about the property. *Id.*.

18. Defendants filed a Notice to Submit for Decision on their Motion to Dismiss Pettit (R. 470-471) prior to the entry of judgment but the motion was heard as a post-judgment motion. R. 728-730.

Plaintiff-appellee's Successful Motion for Summary Judgment

19. In its motion for summary judgment, plaintiff-appellee acknowledged that STC was not a general partnership, but a dba for Land Solutions, LC, that Glezos was the manager for STC and that Pettit was the manager of 90th South Joint Venture, LLC. R. 179-80. However, neither the plaintiff-appellee or the court sought to join these entities.

20. Defendants responded to the motion for summary judgment, but did not comply with the strict requirements of UTAH R. CIV. P. 7; specifically, defendants did not repeat, verbatim, the statement of undisputed facts as alleged by the plaintiff-appellee and specifically designate which facts were and were not admitted. R. 345-377.

21. The district court granted summary judgment in favor of Plaintiff and against all Defendants on September 25, 2007. The order makes no distinction between the liability of the party to the contract, STC, and the individual members of the limited liability companies involved in the transactions. R. 573-583.

22. The order granting summary judgment states in pertinent part:

> Defendant STC Holdings is a dba or trade name for Land Solutions, L.C., a Utah limited liability company. Steve Glezos is the registered agent and sole member of Land Solutions, L.C. . . .Steve Glezos, acting as STC Holdings, entered a contract [the breach of which is the basis for the litigation] . . . .
>
> ***
>
> Glen R. Pettit executed the Assignment of [the contract which is the subject of the litigation] as the authorized agent and sole member of 90th South Joint Venture, L.C., a Utah limited liability company.

R. 575, 578.

23. Although the order granting summary judgment contemplated allowing defendants 15 days to object to plaintiff-appellee's attorneys' fees, (R. 581) the judgment was entered immediately after the order granting summary judgment. R. 568–572.

24. The judgment imposed a monetary award against Glezos and Pettit personally in the amount of $115,736.26 which represented plaintiff-appellee's attorneys' fees and costs. R. 569.

Post-Judgment Motions

25. Defendants filed a timely motion to set aside the judgment, for relief from

the judgment and for a new trial on October 10, 2006 (R. 584-586), objections to proposed award of Plaintiff's attorneys fees and costs (R. 587-596), supported by the affidavit of former counsel for Defendants (R. 597-599), and a "supplemental motion for partial summary judgment" regarding the dismissal of Pettit. (R. 600-604).

26. Thereafter, a notice of substitution of defendants' counsel was filed, together with a motion for relief from the judgment pursuant to UTAH R. CIV. P. 60(b). R. 661-666.

27. Thereafter, a hearing was held on the pending motion to dismiss Pettit, the Defendants' objections to Plaintiff's affidavit of attorneys' fees and costs, Defendants' motion to set aside the judgment, for relief from the judgment and for a new trial, and the Rule 60(b) motion.[1] *R.* 770.

28. At the hearing, the trial court denied all post-judgment motions of the Defendants. After an effort by the parties to settle the matter, an order denying the motions was entered on April 3, 2007. R. 728-730.

29. Notice of Appeal was timely filed by Defendants. R. 732-733.

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[1] Defendants' counsel mistakenly hired a court reporter to attend the January 25, 2007 hearing and draft a transcript which was then filed with the court. Once counsel learned this was an error he had an Official Court Reporter prepare and file a transcript. Hence, the record on appeal contains two transcripts for the same hearing. Counsel apologizes for his blunder.

SUMMARY OF THE ARGUMENT

An internally inconsistent order granting summary judgment was entered in this case. On the one hand, it acknowledges that Pettit and Glezos were acting as agents of limited liability companies. On the other hand, it imposes personal liability on Pettit and Glezos in contravention of the general rule that agents are not personally liable for judgments entered against the limited liability companies on whose behalf they serve. The district court did this even though no facts were ever alleged which would provide a basis to "pierce the corporate veil" or otherwise support a judgment against Pettit and Glezos personally. The entry of the summary judgment order was error.

Defendants submitted pleadings and made objections which at the very least put plaintiff-appellee, as well as, the district court on notice that the real parties in interest should be joined, *i.e.*, the limited liability companies on whose behalf Pettit and Glezos were acting. Despite the submission of these pleading and the eventual determination by the court that Pettit and Glezos were in fact acting as agents of limited liability companies, the district court never cause those entities to be joined and refused to absolve Pettit and Glezos of personal liability. This was an error.

Defendants seek to have the summary judgment order and judgment vacated. It further seeks to have this case remanded with instructions to allow Land Solutions, LC and 90th South Joint Venture, LLC to intervene, assert counterclaims, conduct discovery, and join third-parties.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT AGAINST PETTIT AND GLEZOS PERSONALLY WHERE IT FOUND THEY WERE ACTING ON BEHALF OF LIMITED LIABILITY COMPANIES.

Summary judgment is appropriate where "the is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." UTAH R. CIV. P. 56. On review from the grant of a motion for summary judgment, the appellate court accords no deference to the trial court because entitlement to summary judgment is a question of law. *Hill v. Allred*, 28 P.3d 1271, 2001 UT 16 at ¶12. It is the function of the appellate court to determine whether the trial court erred in applying the law and whether the trial court correctly held that there were no disputed issues of material fact. *Kouris v. Utah Highway Patrol*, 70 P.3d 32, 2003 UT 19 at ¶ 2.

In its order granting summary judgment to the plaintiff-appellee the district court found that there was no dispute regarding the following two facts:

> [First,] Defendant STC Holdings is a dba or trade name for Land Solutions, L.C., a Utah limited liability company. Steve Glezos is the registered agent and sole member of Land Solutions, L.C. . . .Steve Glezos, acting as STC Holdings, entered a contract [the breach of which is the basis for the litigation] . . . .
>
> ***
>
> [Second,] Glen R. Pettit executed the Assignment of [the contract which is the subject of the litigation] as the authorized agent and sole member of 90th South Joint Venture, L.C., a Utah limited liability company.

R. 575, 578.

Clearly, the district court found that Glezos and Pettit were acting on behalf of their respective limited liability companies. However, it imposed judgment against them personally rather than against their limited liability companies; this was an error.

Utah law protects organizers, members, managers and employees from personal liability for actions taken while acting for the limited liability company.

> Except as provided in Section 48-2c-602, no organizer, member, manager, or employee of a company is personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the company or for the acts or omissions of the company or of any other organizer, member, manager, or employee of the company.

UTAH CODE ANN. 48-2c-601.

In order for the district court to have imposed person liability against Pettit and Glezos the "complaint must plead [and the district court must find] a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow." *Norman v. Murray First Thrift & Loan*, 596 P.2d 1028, 1030 (Utah 1979).

In the present case the complaint is devoid of any such allegations. As the complaint makes clear, plaintiff-appellee was originally under the impression that STC was a general partnership between Pettit and Glezos. R. 2. It logically follows that

plaintiff-appellees could never have sought to "pierce the corporate veil" because they never realized that limited liability companies were involved.

Defendants plead the affirmative defense of failure to join and indispensable party. R. 25, 101. Land Solutions, L.C., filed a motion to intervene. R. 35-37. Defendant Pettit filed a motion seeking his dismissal from the litigation. R. 105-109. Eventually, plaintiff-appellee acknowledged that both Pettit and Glezos were acting on behalf of their respective limited liability companies (*See* plaintiff-appellee's motion for summary judgement, R. 179, ¶¶ 3-4) and the district court found this to be an undisputed fact. R. 575, 578. However, plaintiff-appellee took no action whatsoever to join the limited liability companies.

After entry of the $115,736.26 judgment, defendants timely filed a "Motion to Set Aside Judgment, Motion for Relief from Judgment, Motion for a New Trial and for Other Relief." R. 584-586. In that motion defendants clearly objected to Pettit's and Glezos' personal liability. *Id.* Defendant Pettit further objected to his personal liability in his Motion for Partial Summary Judgment. R. 600-604. Finally, new counsel for defendants timely filed a motion under UTAH R. CIV. P. 60(b) motion. All of these motions were denied. R. 728-730.

Because the summary judgment order is internally inconsistent - it both acknowledges that Pettit and Glezos were acting on behalf of their respective limited liability companies yet imposes personal liability on them - this Court should vacated the

order.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT REQUIRING JOINDER OF ENTITIES IT FOUND TO BE THE REAL PARTIES IN INTEREST BUT RATHER IMPOSED PERSONAL LIABILITY ON THEIR AGENTS IN CONTRAVENTION OF UTAH CODE ANN. 48-2C-601.

A party may raise the issue of failure to join an indispensable party for the first time on appeal. *Cassidy v. Salt Lake County Fire Civ. Serv. Council*, 1999 UT App 65, ¶ 9 (citations omitted). Joiner of parties is governed by UTAH R. CIV. P. 19, which states in pertinent part:

> A [limited liability company which] is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if . . . (2) [it] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. *If [it] has not been so joined, the court shall order that [it] be made a party.* [(Emphasis added.)]

A trial court's determination of whether a party should be joined to an action will not be disturbed absent an abuse of discretion. *Green v. Louder*, 2001 UT 62 , ¶ 40.

Originally, plaintiff-appellee alleged that Pettit and Glezos were general partners of STC Holdings. R. 2. Defendants took the following steps to address the issue of defendants failure to join Land Solutions, LC and 90th South Joint Venture, LLC:

1. STC and Glezos filed an answer in which they raised the affirmative defense of failure to join Land Solutions, LC as an indispensable party. R. 25.

2. Pettit filed an answer and also raised the affirmative defense of failure to join Land Solutions, L.C. as an indispensable party. R. 101.

3. In their initial disclosures, defendants tendered a settlement statement which clearly indicated that 90th South Joint Venture was a relevant party. R. 94-96.

4. Land Solutions, L.C. filed a motion to intervene. R. 35-37.

5. Defendants filed a motion to dismiss Pettit from the litigation. R. 105-109.

6. Defendants filed a Notice to Submit for Decision on their Motion to Dismiss Pettit prior to the hearing on plaintiff-appellee's motion for summary judgment. R. 470-471.

7. After the judgment was entered against defendants they filed a timely motion to set aside the summary judgment, for relief from the judgment and for a new trial and in that motion reiterated that Land Solutions, LC and 90th South Joint Venture, LLC were the real parties in interest. R. 584-586.

8. Again, defendants sought the dismissal of Pettit from the litigation after entry of judgment. R. 600-604.

9. Defendants timely filed a motion under UTAH R. CIV. P 60(b) seeking the nullification of the judgment on the grounds that the real party in interest, Land Solutions, LC was not joined. R. 661-666.

10. At the hearing of post-judgment motions, defendants offered to "roll over" the judgment against them should Land Solutions, L.C. and 90th South Joint Venture, L.L.C. be allowed to intervene in the case. In other words, should it be determine that Land Solutions and 90th South Joint Venture were labile for the breach of

> the Agreement the currently existing judgment against them would be "rolled over" and added to the subsequent judgment. R. 770, p.27-28.

Plaintiff-appellee acknowledged in its motion for summary judgment that indeed Glezos and Pettit were acting on behalf of Land Solutions, LC and 90th South Joint Venture. R. 179-180. It necessarily follows that these entities should have been joined as parties yet, plaintiff-appellee never sought their joinder.

Based on plaintiff-appellee's summary judgment motion, the district court ultimately found that Pettit and Glezos were acting on behalf of limited liability companies, however, it imposed personal liability upon them nonetheless. At the post-judgment hearing the district court made much of the fact that defendants former counsel did not comply with UTAH R. CIV. P. 7 and dispute the factual assertions of the plaintiff-appellee. R. 770, p.3. However, defendants agreed the fact that both Pettit and Glezos were acting in their corporate capacity and therefore immune from judgment by operation of UTAH CODE ANN. 48-2c-601.

Upon recognizing the capacity in which Glezos and Pettit were involved in this transaction the district court should have ordered the joinder of Land Solutions, LC and 90th South Joint Venture, LLC. Instead, the court imposed personal liability on Pettit and Glezos; this was error.

Defendants respectfully request that this Court remand this case with instructions to the district court that Land Solutions, LC and 90th South Joint Venture, LLC be joined

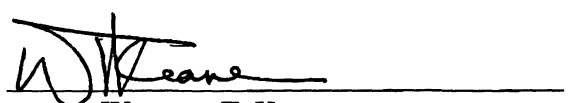
and given an opportunity to conduct discovery, assert counterclaims and join third-parties.

CONCLUSION

It was error for the district court to enter an internally inconsistent order which, one the one hand, acknowledged that Pettit and Glezos were at all relevant times acting in their capacity as agents of limited liability companies, yet on the other hand, imposed personal liability on them. Further, Land Solutions, LC and 90th South Joint Venture, LLC should have been joined as parties because the undisputed facts in the order granting summary judgment clearly detail their involvement.

Defendants respectfully request that this Court vacated the judgment and summary judgment order and remand this case with instructions to the district court that Land Solutions, LC and 90th South Joint Venture, LLC be joined and given an opportunity to conduct discovery, assert counterclaims and join third-parties.

RESPECTFULLY SUBMITTED this 13th day of November, 2007.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Appellants' Opening Brief were mailed, postage prepaid, this 13th day of November, 2007, to the following:

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IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

HORTON V. BOURNE PARTNERSHIP, LTD., a Utah limited partnership, Plaintiff, vs. STC HOLDINGS, a Utah general partnership; STEVE GLEZOS, an individual; and GLEN PETTIT, an individual, Defendants.	**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Civil No. 050603171 Judge Thomas L. Kay

On August 14, 2006 this matter came before the Court for hearing on Plaintiff's Motion for Summary Judgment. The Horton V. Bourne Partnership, Ltd., ("the Bourne Partnership") was represented by Milo Steven Marsden. STC Holdings, Steve Glezos and Glen Pettit (together "Defendants") were represented by Stephen G. Homer. Plaintiffs and Defendants submitted memorandums of law and presented oral argument, after which the matter was submitted for decision. After fully reviewing the parties' memorandums of law, the pleadings, and depositions, answers to

interrogatories, admissions and other factual material from the record, and having heard the parties' oral arguments, and being fully advised in the premises, the Court finds that it is in a position to rule on the Plaintiff's Motion for Summary Judgment, and hereby rules as follows:

1. The Court finds that, based on the materials the parties have submitted to the Court, summary judgment is appropriate under Rule 56 of the Utah Rules of Civil Procedure because there is no genuine issue as to any material fact. Accordingly, there is no issue left to try. Based on the undisputed material facts, the Court finds that the Bourne Partnership is entitled to judgment as a matter of law.

2. The Court finds that in responding to the Bourne Partnership's motion for summary judgment, Defendants failed to comply with the requirements of Rule 7 of the Utah Rules of Civil Procedure. Defendants did not identify particular paragraphs of the Bourne Partnership's statement of facts that were controverted; nor did they provide an explanation of the grounds for any dispute supported by citation to relevant materials in the record. Pursuant to Rule 7, the Bourne Partnership's Statement of Undisputed Material Facts are deemed admitted for purposes of this summary judgment motion.

3. The Court further finds that, even viewing the evidence in the light most favorable to the Defendants, there is no genuine issue as to at least the following facts:

a. The Bourne Partnership is in possession of and holds title to certain real property located in Davis County, Utah, along Burke Lane west of Interstate 15 (hereinafter the "Burke Lane Property"). The Burke Lane Property is more specifically identified by Tax I.D. # 080600004. Its legal description is as follows:

> BEGINNING ON THE NORTH LINE OF BURKE LANE AT THE SOUTHWEST CORNER OF LOT 1, BLOCK 34, BIG CREEK PLAT, DAVIS COUNTY SURVEY, AND RUNNING THENCE NORTH 40.0 RODS; THENCE EAST 35.50 RODS, MORE OR LESS TO THE WESTERLY LINE OF A RAILROAD RIGHT OF WAY; THENCE SOUTHEASTERLY 834.0 FEET, MORE OR LESS ALONG SAID RAILROAD; THENCE SOUTH 9.0 RODS TO THE NORTH LINE OF BURKE LANE; THENCE WEST 82.0 RODS, MORE OR LESS TO THE POINT OF BEGINNING. CONT. 16.19 ACRES.

b. Defendant STC Holdings is a dba or trade name for Land Solutions, L.C., a Utah limited liability company. Steve Glezos is the registered agent and sole member of Land Solutions, L.C.

c. On or about June 15, 2004, the Bourne Partnership and Steve Glezos, acting as STC Holdings, entered a contract for the purchase and sale of the Burke Lane Property. The contract was made up of a written "Purchase Agreement," that Defendants drafted, and two pre-printed "Addendum to Real Estate Purchase Contract" forms, on which the parties had exchanged counteroffers regarding price and a few other terms.

d. The "Effective Date" of the Purchase Agreement was June 15, 2004.

e. The Purchase Agreement provides that the price for the Burke Lane Property is to be "$600,000, or $37,060 per net usable acre." The term "net usable acres" is defined in Section 2(a) of the Purchase Agreement as follows:

> The term "net usable acres" as used herein shall mean the gross number of acres within the Property reduced by that portion of the Property which is unusable because of easements, dedications of right-of-way for roadway purposes of [sic] other purposes which would prevent the erection of any improvements on that portion of the Property affected and which are existing as of the date of the final Survey.

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f. The Purchase Agreement further specifies deadlines for the parties to perform their obligations under the contract related to determining whether any property is to be excluded under the definition of "net usable acres."

g. Paragraph 6 of the Purchase Agreement states that "within thirty (30) days of the Effective Date of the Agreement," the Seller is to provide the Buyer with "a copy of any survey(s) of the Property in the Seller's possession." The Buyer "may, at its sole cost, within ten (10) days of receiving any such Survey(s), order an update of [sic] new Survey as Buyer may desire." Paragraph 6 further provides that "[i]f buyer elects to update or enhance the Survey, it shall pursue completion of the same with diligence."

h. The Court finds that Defendants had only until July 25, 2004 (*i.e.*, 40 days after the Effective Date) by which to order an update of any existing survey or to order a new survey of the Burke Lane Property.

i. Paragraph 7 of the Purchase Agreement states that "Buyer shall give notice to Seller of any matters contained in the Title Commitment of [sic] Survey to which Buyer objects." Paragraph 8 of the Purchase Agreement states that "Seller shall have thirty (30) days after receipt of the notice contemplated by paragraph 7 . . . to cure the Objections to the satisfaction of Buyer or elect no[t] to cure the same."

j. Paragraph 12 of the Purchase Agreement states that the transaction "shall be closed on the Closing date at the office of the Title Company." Paragraph 12 defines "Closing date" as a date within thirty (30) days after the expiration of the Feasibility Period, or satisfaction or waiver of the feasibility conditions. Here, the Court finds that the last day for Closing was no later than July 13, 2005.

k. Paragraph 18 of the Purchase Agreement states that "[i]f closing does not occur due solely to a default by Buyer, Seller shall retain the Earnest Money and all other deposits as liquidated damages." And, paragraph 25 of the Purchase Agreement states that "[i]n any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorneys' fees."

l. There is conflicting evidence regarding the date when Mr. Glezos first engaged Ralph Goff & Associates ("Goff") to survey the Burke Lane Property. Viewing the evidence in the light most favorable to Defendants for purposes of this motion for summary judgment, it appears that Mr. Glezos engaged Goff "somewhere the week of June 20th of 2004," and asked them to survey the Burke Lane Property.

m. It was not until nearly one year later, June 6, 2005, that Goff representatives went to the Burke Lane Property and performed fieldwork, and it was not until June 24, 2005 that the survey was completed (the "Goff survey").

n. The Goff survey plotted three areas it called "wetland areas": wetlands area 1, consisting of 1.3139 acres; wetlands area 2, consisting of .0645 acres; and wetlands area 3 consisting of .1385 acres.

o. In plotting these "wetland areas," Goff did not do a wetlands delineation in compliance with the requirements of the Clean Water Act, The Rivers and Harbor Act, or regulations promulgated by the Army Corp of Engineers under these statutes.

p. Goff is not qualified by schooling, experience, or otherwise, to perform a wetlands delineation in compliance with the requirements of the Clean Water Act, The Rivers and Harbor Act, or regulations promulgated by the Army Corp of Engineers under these statutes.

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q. The Goff survey also plotted an area it designated as "Surveyed Easement for Utah Power and Light." This area contained approximately ½ of an acre of ground that was not within the legal description of any easement that appears in the state or county records.

r. On July 7, 2005, Defendant "Land Solutions, L.C., or STC Holdings, or Steve Glezos," executed an "Assignment of Purchase Agreement," pursuant to which Land Solutions, L.C., STC Holdings and Steve Glezos "assign[ed], transfer[red], and set over to 90th South Joint Venture, L.C., or Assigns, all right, title, and interest in and to the Purchase Agreement dated June 15, 2004. . . ." Glen R. Pettit executed the Assignment of Purchase Agreement as the authorized agent and sole member of 90th South Joint Venture, L.C., a Utah limited liability company.

s. On July 8, 2005, the Defendants sent the Bourne Partnership a letter telling the Bourne Partnership that the closing documents had been executed and funds had been delivered to the escrow agent. The letter stated that "[t]he purchase price has been adjusted as defined in paragraph 6d of the Real Estate Purchase Contract." Attached to the letter was a "Settlement Statement" showing $449,888.58 as the "Contract Sales Price." All of the closing documents, including the Settlement Statement, were executed by Glen Pettit, on behalf of 90th South Joint Venture, L.C.

t. On July 8, 2005, the Bourne Partnership notified the Defendants that their adjustment to the price was incorrect, and that their tender was insufficient.

u. On July 15, 2005, Defendant STC Holdings filed a "Notice of Interest" on the Burke Lane Property with the Davis County Recorder.

4. Based upon these undisputed facts, the Court concludes and determines that Plaintiff's motion for summary judgment is well-taken and should be granted.

a. The Court concludes that under the Purchase Agreement the burden was on the Defendants, as Buyers, to establish that property was "unusable" and that an adjustment to the $600,000 purchase price was appropriate.

b. In order to deduct property, the Defendants needed to show that the property was "unusable because of easements, dedications of right-of-way for roadway purposes of [sic] other purposes which would prevent the erection of any improvements on that portion of the Property affected and which are existing as of the date of the final Survey."

c. Defendants made at least two property deductions that were not justified under the language of the Purchase Agreement.

i. First, Defendants deducted approximately 1.5169 acres as "wetlands." However, there is no admissible evidence to support the determination that 1.5169 acres of the Burke Lane Property is unusable because it is "wetlands." The only evidence offered on this point is the Goff survey. However, to provide admissible evidence that portions of the Burke Lane Property are wetlands, Goff would have to be qualified under Rule 702 of the Utah Rules of Evidence to provide expert testimony on this topic. The Court knows from its experience in cases involving the Legacy Highway that wetlands delineations require highly specialized knowledge. There is nothing before the Court to show that Goff is qualified to offer opinions on this topic. Indeed, it is undisputed that Goff is not qualified to make a wetlands determination, and is not qualified to offer expert testimony on this topic. In light of this, the Court concludes that there is no evidence to support Defendants' deduction of approximately 1.5169 acres as "wetlands" under the Purchase Agreement.

ii. Second, Defendants deducted approximately ½ an acre of property as a "Surveyed Easement for Utah Power and Light." However, the undisputed facts are that this ½ acre of ground is not within the legal description of any easement that appears in the state or county records. There is no evidence in the record to support its exclusion. The Court concludes that it should not have been deducted because there was no basis to do so.

d. The Court concludes that the Defendants also breached their obligations under the Purchase Agreement with regard to when they were to obtain a survey and to provide it to the Bourne Partnership. The Purchase Agreement required the Defendants to order a survey or an update of a survey within 40 days after the Effective Date, and it required the Defendants to pursue completion of the survey with diligence. Here, the Defendants essentially sat on their hands for a year, and then provided the Bourne Partnership their survey just a few days before the last day for closing the transaction. The Court concludes that the Defendants did not pursue completion of their survey with diligence.

Therefore,

IT IS HEREBY DECLARED AND ORDERED,

1. That the Bourne Partnership's Motion for Summary Judgment is granted;

2. That because of Defendants' failure to tender the purchase price for the Burke Lane Property required under the terms of the Purchase Agreement, the Purchase Agreement expired by its terms on July 13, 2005;

3. That the Bourne Partnership is the owner of fee title to the Burke Lane Property, and that the Defendants and each of them has no right, title, estate or interest therein;

4. That the "Notice of Interest" in the Burke Lane Property filed by Defendant STC Holdings on July 15, 2005 is declared null and void; and

5. That pursuant to paragraph 25 of the Purchase Agreement, the Bourne Partnership is the prevailing party and is entitled to an award of its costs and reasonable attorneys' fees. The Bourne Partnership shall serve an affidavit of its fees and costs by September 13, 2006. Defendants' objections, if any, to the Bourne Partnership's affidavit shall be served and filed by October 13, 2006.

DATED this 19th day of September, 2006.

BY THE COURT:

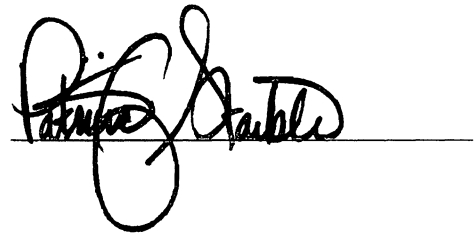
HONORABLE THOMAS L. KAY

STATE OF UTAH
SECOND JUDICIAL DISTRICT
DAVIS COUNTY, LAYTON UTAH

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was hand-delivered on the 8th day of September, 2006, to the following:

Stephen G. Homer
Attorney at Law
9225 South Redwood Road
West Jordan, Utah 84088



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I hereby certify that a true and correct copy of this **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was delivered via U.S. Mail, on the 19th day of September, 2006, to the following:

Stephen G. Homer
Attorney at Law
9225 South Redwood Road
West Jordan, Utah 84088

Tab 2

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Attorneys for Plaintiff

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

HORTON V. BOURNE PARTNERSHIP, LTD., a Utah limited partnership, Plaintiff, vs. STC HOLDINGS, a Utah general partnership; STEVE GLEZOS, an individual; and GLEN PETTIT, an individual, Defendants.	**ORDER ON POST-TRIAL MOTIONS** Civil No. 050603171 Judge Thomas L. Kay

On January 25, 2007 this matter came before the Court for hearing on (1) Defendants' Motion to Set Aside Judgment, Motion for Relief from Judgment, Motion for New Trial and for Other Relief ("Motion to Set Aside Judgment"), (2) Defendants' "Objections" to Proposed Award of Plaintiff's Attorney's Fees and Demand for Trial on Attorney's Fees Issue/Claims ("Defendants' Objections"), (3) Defendants' Motion to Dismiss Glen Pettit from Litigation ("Motion to Dismiss"), and (4) Defendants' Rule 60(b), U.R.C.P., Motion. The Horton V. Bourne Partnership, Ltd., ("the Bourne Partnership") was

represented by Milo Steven Marsden. STC Holdings, Steve Glezos and Glen Pettit (together "Defendants") were represented by Walter T. Keane. Plaintiff and Defendants submitted memorandums of law and presented oral argument, after which the matter was submitted for decision. Being fully advised in the premises, and for the reasons stated at the hearing the Court rules as follows:

1. Defendants' Motion to Set Aside Judgment is DENIED;

2. Defendants' Objections are WITHDRAWN, pursuant to Defendants' representation at the hearing;

3. Defendants' Motion to Dismiss is DENIED; and

4. Defendants' Rule 60(b), U.R.C.P. Motion is DENIED.

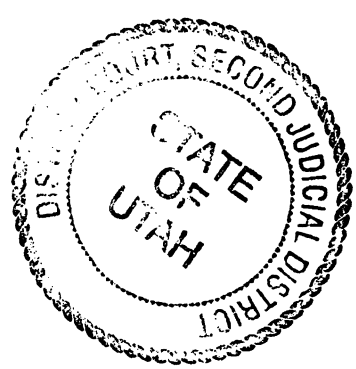
DATED this 30th day of March, 2007.

BY THE COURT:

HONORABLE THOMAS L. KAY

APPROVED AS TO FORM:

Walter T. Keane
Walter T. Keane, P.C.
Attorneys for Defendants



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this **ORDER ON POST-TRIAL MOTIONS** was hand-delivered on the 22nd day of March, 2007, to the following:

Walter T. Keane
Walter T. Keane, P.C.
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106

Hilda Echegaray

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